IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35619

IN THE MATTER OF THE ESTATE OF: BONNIE F. LOSSER, DECEASED.	)	
CHARLES OLIVER LOSSER,	)	**2009 Unpublished Opinion No. 697**
Plaintiff-Appellant,	)	**Filed: November 25, 2009**
v.	)	**Stephen W. Kenyon, Clerk**
TRESCO OF IDAHO,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
Defendant-Respondent.	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge. Hon. Christopher M. Bieter, Magistrate.

Order of the district court on intermediate appeal from the magistrate division affirming distribution of will, affirmed.

Gale M. Merrick, Boise, for appellant.

Steven F. Scanlin, Boise, for respondent.

GUTIERREZ, Judge

Charles Oliver Losser appeals the district court's intermediate appellate decision affirming the calculation and computation for distribution of his mother's will.

I.
BACKGROUND

Charles Losser and Shauna Bradstreet are siblings and the sole heirs of their mother's estate. Her will specified that the two siblings would share the residuary estate equally. A disinterested third party, Tresco, was appointed by the probate court to serve as the personal representative of the estate. Tresco administered the estate and ultimately filed a final accounting and proposal for disposition of the estate. The final value of the estate was $14,791.52 after attorney and personal representative fees were deducted. Divided between the two heirs, each would receive $7,395.76. However, their mother's will also stated:

> PROVIDED FURTHER HOWEVER, that the share given, devised, and bequeathed to my son, Charles Oliver Losser, be decreased by Ten Thousand Dollars ($10,000.00) for the reason that I cosigned for him on a boat against my better judgment and I do not want my estate to pay any amounts for the cosigned loan. This proviso shall continue to apply whether or not the cosigned loan is paid in full by Charles Oliver Losser prior to or subsequent to my death to ensure the uncomplicated administration of my estate and probate of my Will.

Pursuant to this provision, Losser's proposed distribution was reduced by $10,000 resulting in Losser owing the estate $2,604.24. Thereafter, as the only other heir, Bradstreet's distribution increased by $10,000, leaving her with a total of $17,395.76. Losser objected to the final accounting of Tresco, but the magistrate overruled all of his objections, determining that the calculations were correct. Losser appealed the magistrate's decision to the district court, arguing that the manner in which the deduction was made was incorrect and that the magistrate improperly applied the provision in the will. The district court affirmed the magistrate's interpretation and application of the provision. Losser now appeals the district court's decision.

II.
STANDARD OF REVIEW

When the district court has rendered a decision on an appeal from the magistrate division, this Court reviews the district court decision directly. *Carter v. Zollinger*, 146 Idaho 842, 844, 203 P.3d 1241, 1243 (2009); *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). This Court conducts free review of the legal issues analyzed by the district court acting in its appellate capacity. *Carter*, 146 Idaho at 844, 203 P.3d at 1243. Over questions of law we exercise free review. *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007); *Toms v. Davies*, 128 Idaho 303, 305, 912 P.2d 671, 673 (Ct. App. 1995).

III.
DISCUSSION

A. The Calculation for Distribution of the Will is Correct

Losser asserts that the calculation for final distribution of the will is mathematically incorrect resulting in a doubling of the reduction provided in the will. He argues that by dividing the current estate assets into equal shares, then deducting $10,000 from his share, the result is a difference of $20,000 given to each heir, not $10,000. Losser contends that instead, the $10,000 deducted from his share should be added back in the residuary estate and then split equally between the two heirs. However, Losser has provided no legal authority in support of his

argument. It is well established that an appellate court will not consider a claim of error that is not supported by both argument and citation to authority. *State v. Grazian*, 144 Idaho 510, 518, 164 P.3d 790, 798 (2007); *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (stating when issues on appeal are not supported by propositions of law, authority or argument, they will not be considered). A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking. *Zichko*, 129 Idaho at 263, 923 P.2d at 970.

Futhermore, the calculation Losser proposes would result in his share being decreased by only $5,000, because he would recapture the other $5,000 from the residuary estate. When interpreting the terms of a will, the intent of the testator controls. I.C. § 15-2-603; *Wilkins v. Wilkins*, 137 Idaho 315, 48 P.3d 644 (2002); *Hintze v. Black*, 125 Idaho 655, 658, 873 P.2d 909, 912 (Ct. App. 1994). If the language of the will is clear and unambiguous, this intent is derived from the will itself. *Id.* It is important to note that Losser does not even attempt to argue that the will was ambiguous. Even so, the district court determined that the language of the will was unambiguous and clear, and that there was no legal basis for Losser's contention. We agree with the district court. The language of the will clearly states that Losser's share of the estate should be decreased by $10,000, which results in Bradstreet's share being increased by $10,000. The will does not state that the *difference* in the amount distributed to the two heirs should be $10,000 as Losser suggests, it only provides that Losser's share be decreased by $10,000. Therefore, it is irrelevant that the difference in the distribution amount between the two heirs was $20,000. If we were to use Losser's calculation, the decrease in his share would be only $5,000, and that clearly was not the decedent's intent. Consequently, we agree with the district court that the calculation was correct.

B. Attorney Fees on Appeal

Losser requests attorney fees on appeal, but presents no argument or authority in support of his request. Instead, he requests fees pursuant to I.A.R. 41(a), which is a procedural rule through which attorney fees are requested but is not by itself a substantive basis for an award of attorney fees. Accordingly, we deny attorney fees on appeal. *Dominguez ex rel. Hamp v. Evergreen Resources, Inc.*, 142 Idaho 7, 14, 121 P.3d 938, 945 (2005).

Tresco also requests attorney fees and costs on appeal under I.C. § 12-121 and I.A.R. 41. An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the

appeal has been brought or defended frivolously, unreasonably or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995). The district court awarded attorney fees below, noting Losser had failed to even argue the language of the will was ambiguous, a prerequisite for arguing the language of the will is subject to differing interpretation. On appeal, Losser again proceeds to argue the will is subject to differing interpretations but without presenting any argument that the language of the will is ambiguous. Therefore, we conclude that this appeal was brought and pursued frivolously, unreasonably and without foundation. We award Tresco, as the prevailing party, attorney fees and costs on appeal.

IV.
CONCLUSION

For the stated reasons, the district court's intermediate appellate decision affirming the calculation and computation for distribution of the will is affirmed. Moreover, we deny Losser's request for attorney fees on appeal. Costs and attorney fees are awarded to Tresco on appeal.

Judge GRATTON and Judge MELANSON **CONCUR**.